IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ROBERT GLEN COE,	)	
	)	
Petitioner,	)	
	)	Case No. 3:00-0239
v.	)	Judge Trauger
	)	
RICKY BELL, Warden,	)	
	)	
Respondent.	)	

ORDER

For the reasons set out in the accompanying Memorandum, Robert Glen Coe's Petition for a Writ of *Habeas Corpus* is **DENIED** in all respects. The stay of execution issued by this court on March 22, 2000 is hereby lifted.

ALETA A. TRAUGER
United States District Judge

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MEMORANDUM

Before the court is Robert Glen Coe's Petition for Writ of Habeas Corpus (Docket No. 1), to which Respondent has filed an Answer (Docket No. 9) and Petitioner has filed a Reply (Docket No. 30).

STATEMENT OF FACTS and PROCEDURAL HISTORY

The present petition is limited to the issue of Coe's competency to be executed. Accordingly, the court confines itself to this issue in recounting the relevant facts and history of the case.[1]

After the United States Supreme Court declined to review Coe's last habeas corpus case,[2] the State of Tennessee filed a motion in the Tennessee Supreme Court requesting that a date be set for his execution. On December 15, 1999, the Tennessee Supreme Court entered an order setting Coe's execution for March 23, 2000 and stating that any claim of incompetency to be

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[1]For a more complete statement of the underlying facts and procedural history of this case, see Coe v. Bell, 161 F.3d 320 (6th Cir. 1998).

[2]Coe v. Bell, --- U.S. ---, 120 S. Ct. 110, 145 L.Ed.2d 93, *reh'g denied*, --- U.S. ---, 120 S. Ct. 567, 145 L. Ed 2d 442 (1999).

(36)

executed was now ripe. Coe made such a claim and the Tennessee Supreme Court remanded the matter to the Shelby County Criminal Court, where Coe was originally tried and convicted, ordering that the competency issue be determined under the procedures and standards set out in Van Tran v. State, 6 S.W.3d 257 (Tenn. 1999).

Coe filed a petition supported by a psychiatrist's affidavit in the Shelby County Criminal Court, asserting that he is incompetent to be executed. On January 3, 2000, Judge John P. Colton, Jr. found that Coe had satisfied the threshold showing required by Van Tran and that his competency to be executed was genuinely in issue. An evidentiary hearing was held before Judge Colton from January 24 to January 28, 2000. On February 2, 2000, Judge Colton issued a 28-page opinion,[1] finding that Coe was "presently mentally competent to be executed" under the Van Tran standard – he has the mental capacity to understand the fact of the impending execution and the reason for it.

Coe then appealed Judge Colton's order to the Tennessee Supreme Court. After a *de novo* review of all claims, on March 6, 2000, the Tennessee Supreme Court issued an opinion affirming the decision of the trial court that Coe is presently competent to be executed. See Coe v. State, 2000 WL 246425 (Tenn. Mar. 6, 2000), *cert. denied*, — S. Ct. —, 2000 WL 295230 (U.S. Mar. 22, 2000). The court also reaffirmed that the procedures established in Van Tran provide at least the due process to which the petitioner is entitled under Ford v. Wainwright, 477 U.S. 399, 106 S. Ct. 2595, 91 L.Ed.2d 335 (1986), and that those procedures were followed in his hearing before Judge Colton.

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[1]This opinion is an appendix to the Tennessee Supreme Court's opinion. See Coe v. State, 2000 WL 246425, at *2 (Tenn. Mar. 6, 2000).

On March 16, 2000, Coe filed a Petition for Writ of Habeas Corpus in this court. On March 17, 2000, Respondent Ricky Bell filed an Answer to Petition for Writ of Habeas Corpus (Docket No. 9). On March 18, 2000, this court transferred this case to the Sixth Circuit Court of Appeals for a determination of whether this court had jurisdiction to review the petition. On March 21, 2000, the Sixth Circuit Court of Appeals held that this court did have jurisdiction. On March 22, 2000, this court issued a stay of the March 23, 2000 execution pending this court's review of Coe's claims.

STANDARD OF REVIEW

In holding that this court did have jurisdiction to rule on the present petition, the Sixth Circuit Court of Appeals did not explicitly state the proper jurisdictional basis for this court's review.

Although Petitioner asserts that this court has jurisdiction over the present petition under 28 U.S.C. §2241 and 8 U.S.C. §2254, the court finds that jurisdiction over this petition is proper only under 28 U.S.C. §2254. In directing this court to review Petitioner's Ford claim on the merits, the Sixth Circuit held that "[u]nder the unique circumstances of this case, where any prior attempt to raise the *Ford* issue would almost certainly have been dismissed as premature, it would not have been an abuse of the writ to permit the district court to consider it. *See In re Hanserd; Stewart v. Martinez-Villareal*, 118 S. Ct. 1618 (1998); *see also Nguyen v. Gibson*, 162 F.3d 600, 601 (1998) (Briscoe, J., dissenting)."[4] Coe v. Bell, Nos. 00-5323/5327/5328/5329,

[4]The court finds that 28 U.S.C. §2241 is not an appropriate basis for jurisdiction over this petition. The authority cited by the Sixth Circuit Court of Appeals in returning the case to this court indicates that the appropriate basis for jurisdiction is 28 U.S.C. §2254. In In re Hanserd, the Sixth Circuit held that the AEDPA did not bar a federal prisoner's second motion to vacate

March 21, 2000 Order, at 5-6

This petition was filed on March 17, 2000, so the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA")[5] apply for purposes of this court's analysis.[6] See Lindh v. Murphy, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L.Ed.2d 481 (1997), Harpster v. State of Ohio, 128 F.3d 322, 325 (6th Cir. 1997). In finding that this court has jurisdiction over this petition, it would appear that the Sixth Circuit determined that this present petition was not a "second or successive" petition under the AEDPA and, as such, it is not barred by the requirements of 28 U.S.C. §2244(b)(2). This court's standard of review, however, must follow the AEDPA. See, e.g., Brown v. O'Dea, 187 F.3d 572 (6th Cir. 1999) (finding that although first

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sentence under 28 U.S.C. §2255 because petitioner's first §2255 motion was filed prior to the enactment of the AEDPA. In re Hanserd, 123 F.3d 922 (6th Cir. 1997). While discussing the available avenue of §2241 for the federal prisoner's motion, the court found that he could proceed under §2255. In Martinez-Villareal, the Supreme Court determined that the AEDPA did not bar the petitioner's Ford claim in his post-AEDPA habeas petition because the first habeas petition, filed prior to the AEDPA, had been dismissed as premature. Stewart v. Martinez-Villareal, 523 U.S. 637, 118 S. Ct. 1618, 140 L.Ed.2d 849 (1998). In the dissent in Nguyen, Circuit Judge Briscoe stated that the petitioner's newly-raised Ford claim in his §2254 petition should not be barred by the restrictions under the AEDPA and that the petitioner should be allowed to proceed with his §2254 petition in the district court. Nguyen v. Gibson, 162 F.3d 600 (10th Cir. 1998) (Briscoe, J., dissenting). Martinez-Villareal and Nguyen, both §2254 cases, do not even discuss §2241. In light of the holdings of these cases, it appears to this court that the jurisdictional basis for Petitioner's present petition is under §2254 and not §2241.

[5]Pub.L. No. 104-132, 110 Stat. 1214 (1996). The effective date of the Act was April 24, 1996.

[6]Petitioner argues that the AEDPA does not apply to this case because application of the AEDPA to the merits of his claim would "impose retroactive effects." (Docket No. 30 at 2) However, there is no support for Petitioner's argument that the Hanserd retroactivity analysis that governs whether a petitioner is procedurally barred from bringing a second-in-time habeas corpus petition also applies to the merits of his claim. By finding that Petitioner's present petition was not barred under 2244(b) as a "second or successive" petition, the Sixth Circuit did not imply that the AEDPA did not govern the resolution of the merits of his claim.

§2254 petition was filed prior to AEDPA and second §2254 petition was filed after AEDPA, the second petition was not barred as "second or successive" petition but denied habeas relief under §2254(d) provision of the AEDPA).

Under the AEDPA, federal courts must give greater deference to determinations made by state courts than they were required to do before the Act. See Jones v. Jones, 76 F.Supp.2d 850, 854 (E.D. Tenn. 1999). A federal court reviewing a state court decision under the AEDPA may only grant a petition for a writ of habeas corpus where the state court proceedings:

> (1) resulted in a decision that was *contrary to*,[7] or involved an *unreasonable application of*, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding

28 U.S.C. §2254(d) (emphasis added). Factual findings reached by the state court carry a presumption of correctness that the petitioner has the burden of rebutting by clear and convincing evidence. 28 U.S.C. §2254(e)(1).

Petitioner has asserted that the issue of competency is a mixed question of law and fact. (Docket No. 4 at 14, citing Levine v. Torvik, 986 F.2d 1506, 1514 (6th Cir. 1993)). The Tennessee Supreme Court in Van Tran clearly held that "[a]lthough likely based upon expert medical and mental health testimony, the ultimate question as to whether the prisoner is competent is a question of fact." Van Tran, 6 S.W.3d at 271. In so holding, the court cited to Maggio v. Fulford, 462 U.S. 111, 103 S. Ct. 2261, 76 L.Ed.2d 794 (1983), in which the Supreme

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[7]The Sixth Circuit Court of Appeals has not yet analyzed a habeas challenge under the "contrary to" prong. See, e.g., Ashe v. Jones, 2000 WL 263342, at *2 (6th Cir. Feb. 29, 2000) (unpublished).

Court treated the issue of competency to stand trial as a factual issue.[8] Since the ruling in Maggio, the Supreme Court, in addressing the issue of whether a question is to be treated as a factual or legal issue for purposes of §2254(d), confirmed that it has classified as a factual issue the question of competency to stand trial.[9] See Thompson v. Keohane, 516 U.S. 99, 110-111, 116 S. Ct. 457, 133 L.Ed 2d 383 (1995). Despite these Supreme Court rulings, the Sixth Circuit has repeatedly held that competency is a mixed question of law and fact.[10] See e.g., United States v. Ford, 184 F.3d 566, 581 (6th Cir. 1999); Devine v. Commonwealth of Kentucky, 187 F.3d 635, 1999 WL 551400 (6th Cir. July 20, 1999); Cremens v. Chapleau, 62 F.3d 167, 169 (6th Cir. 1995), *cert. denied*, 516 U.S. 1096 (1996). It makes a technical difference in the analysis.

If competency is a question of fact, the state court determination is entitled to the presumption of correctness, and the petitioner must rebut the presumption by clear and

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[8]In a concurring opinion, Justice White noted that prior Supreme Court precedent has treated the "ultimate question whether a defendant is competent to stand trial as at least a mixed question of law and fact." Maggio, 462 U.S. at 118-19 (citing Drope v. Missouri, 420 U.S. 162, 174-75, 175 n.10 (1975) and Pate v. Robinson, 383 U.S. 375, 385-86 (1966)). Justice White concurred in the judgment reversing the appellate court's finding that the state court's determination that the petitioner was competent to stand trial, but stated that he "cannot agree with the Court that competency is a question of historical fact . . . ." Id. at 119.

[9]The Supreme Court stated that while these factual issues "encompass more than 'basic, primary, or historical facts,' their resolution depends heavily on the trial court's appraisal of witness credibility and demeanor. . . . This Court has reasoned that a trial court is better positioned to make decisions of this genre, and has therefore accorded the judgment of the jurist-observer 'presumptive weight.'" Thompson, 516 U.S. at 465.

[10]"Mixed questions of law and fact "are those decisions which require the application of a legal standard to fact determinations." Nevers v. Killinger, 990 F. Supp. 844, 850 (E.D. Mich. 1997) (citing Thompson v. Keohane, 516 U.S. 99, 109-11, 116 S. Ct. 457, 133 L.Ed.2d 383 (1995)).

convincing evidence. See 28 U.S.C. §2254(e)(1). In addition, an application for a writ of habeas corpus must be denied unless the state court decision was based on an "unreasonable determination of the facts in light of the evidence presented" at the hearing. 28 U.S.C. §2254(d)(2).

If competency is a mixed question of law and fact, the presumption of correctness does not apply, and the analysis must be under §2254(d)(1). See Nevers, 169 F.2d at 360. See also Harpster, 128 F.3d at 327. The Sixth Circuit has defined an "unreasonable application[] of clearly established Federal law, as determined by the Supreme Court" under §2254(d)(1) to be a state court decision "so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes." Nevers, 169 F.3d at 362 (citing O'Brien v. Dubois, 145 F.3d 16, 25 (1st Cir. 1998)).[11]

As a practical matter, for purposes of this case, this court need not decide whether to analyze the state court determination under the "fact" standard or under the "mixed question of law and fact" standard. This is not a close case, and the result would be the same under either standard. In the interest of brevity, the analysis will be conducted only under the "mixed

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[11] The court looks to the Sixth Circuit's application of this standard for guidance. In King v. Trippett, 192 F.3d 517, 521 (6th Cir. 1999), the court found that the state court's upholding of a conviction after the prosecutor presented a witness who had failed a polygraph test, without disclosing that the witness had ever taken a polygraph test, was not "unreasonable." See also Combs v. Coyle, --- F.3d ---, 2000 WL 201971 (6th Cir. Feb. 23, 2000) (reversing district court's denial of habeas relief on ineffective assistance of counsel claim where defense counsel failed to object to prosecutor's comment on the defendant's pre-arrest silence after invoking his Fifth Amendment privilege against self-incrimination); Barker v. Yukins, 199 F.3d 867 (6th Cir. 1999) (reversing district court denial of habeas relief, finding "unreasonable" application of federal law where state supreme court found harmless error in trial court's failure to instruct jury that the defendant was justified in using deadly force if acting in self-defense).

question of law and fact" standard, as the Sixth Circuit and the petitioner would have it be.

DISCUSSION

I. *Petitioner's Claims for Relief*

A. *Petitioner is not competent to be executed.*

The trial court decided on February 2, 2000 that Robert Glen Coe "is presently mentally competent to be executed." (Trial Ct. Op. at 28)[12] On March 6, 2000, the Tennessee Supreme Court issued a 26-page opinion which concluded:

> Having carefully reviewed *de novo* each of the legal claims raised by the appellant, a majority of this Court concludes that none have merit. In addition, each member of this Court has thoroughly reviewed the record in this appeal and a majority concludes that the evidence fully supports and does not preponderate against the trial court's finding that the appellant is presently competent to be executed. Accordingly, we affirm the decision of the trial court.

Coe v. State, 2000 WL 246425, at *35 (Tenn. Mar. 6, 2000). The "majority" consisted of four members of the five-member court.[13]

In structuring the manner in which the question of the competency of a prisoner to be executed is to be determined, the Tennessee Supreme Court held, in consonance with Justice Powell's concurring opinion in Ford, and as many state statutes provide, that at the hearing the prisoner is presumed to be competent to be executed. Van Tran, 6 S.W.3d at 270. The prisoner must overcome this presumption of competency by a preponderance of the evidence. Id. at 270-

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[12]The trial court decision is attached to this court's memorandum opinion as an appendix and is referenced herein as "Trial Ct. Op."

[13]Justice Birch dissented solely because the procedures used in Coe were those which he disapproved as violative of due process in his dissent in Van Tran. He did not reach the merits in Coe.

71. At the hearing, the prisoner has the opportunity to be heard and to present evidence relevant to the issue of competency, and he or she is entitled to cross-examine the State's witnesses. Id. at 271. The rules of evidence "should not be applied to limit the admissibility of reliable evidence that is relevant to the issue of the prisoner's competency." Id.

It is important to note that in Ford, where the Supreme Court articulated that the Eighth Amendment prohibits the State from executing a prisoner who is insane, the Court held deficient a Florida procedure that afforded prisoners about to be executed no procedural safeguards. Under that procedure, when the governor was informed that a prisoner about to be executed might be insane, the governor appointed three psychiatrists who examined the prisoner at the same time and made a report to the governor. The governor then determined whether the prisoner had the mental capacity to be executed. Ford, 477 U.S. at 412. The Supreme Court found this process deficient because: 1) the prisoner was not allowed to present any material relevant to his sanity to be executed; 2) the prisoner was given no opportunity to challenge the opinions of the state-appointed psychiatrists or cross-examine them in any way; and 3) the entire process and decision making was lodged in the governor. Having found the Florida process entirely devoid of due process, but without providing much positive guidance, the court stated:

> We do not here suggest that only a full trial on the issue of sanity will suffice to protect the federal interests, we leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences. It may be that some high threshold showing on behalf of the prisoner will be found a necessary means to control the number of nonmeritorious or repetitive claims of insanity. . . Other legitimate pragmatic considerations may also supply the boundaries of the procedural safeguards that feasibly can be provided.

Ford, 477 U.S. at 416-17.

The Ford decision was issued in 1986. The Tennessee legislature never enacted a statutory scheme for the determination of the competency of prisoners to be executed. See Van Tran, 6 S.W.3d at 263. Therefore, with the first execution in 40 years approaching, the Tennessee Supreme Court in November 1999 promulgated a procedure in Van Tran to fill the void.

In Van Tran, the Supreme Court prescribed a strict timetable for the determination of a prisoner's competency to be executed. Id. at 273. This quick pace is absolutely essential because the issue of competency to be executed is not ripe "until execution is imminent," but must be made "in proximity to the execution." Id. at 263-64 (citations omitted).[14]

The standard for competency to be executed in Tennessee is set out in Van Tran. A prisoner may not be executed if he or she "lacks the mental capacity to understand the fact of the impending execution and the reason for it." Id. at 266. This was the central issue in the hearing held before the trial court and the context within which all of the proof must be analyzed.

At the hearing, the court heard live testimony from four psychiatrists and two neuropsychologists. Petitioner's medical records going back to at least 1975 were made available to the experts. See Docket No. 12, Trial Exs. 1, 4, 10, 11.

The Tennessee Supreme Court opinion in Coe gives a comprehensive and accurate summary of the medical testimony which this court adopts herein and will not attempt to replicate. See Coe v. State, 2000 WL 246425, at *2-7. This court has done its own review of all

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[14]These considerations have been the driving force behind this court's setting aside all other business in order to review the lengthy record in this case and render a prompt decision. Perhaps it is the impracticality of this situation that caused Justice O'Connor in Ford to state that "federal courts should have [no] role whatever in the substantive determination of a defendant's competency to be executed. Ford, 477 U.S. at 427-28.

of the testimony and will summarize herein the additional matters considered pertinent to the determination of petitioner's competency to be executed.

1. *Dr. James R. Merikangas*

Dr. Merikangas was the first witness for the petitioner. He was qualified to testify as an expert witness in the fields of neurology, neuropsychiatry and psychiatry. (Docket No. 12, Tr. 81) He is a lecturer in psychiatry at Yale University School of Medicine and has a private practice in Woodbridge, CT. (Trial Ex. 2) He has assisted 117 death row inmates in their appeals and has been retained by the prosecution in only one case. (Tr. 213-14) He conducted a physical and a neurological examination of Coe on January 13, 2000. (Tr.88; Trial Ex. 2) The examination lasted one and one-half hours. (Tr. 182)

Dr. Merikangas' testimony is an excellent example of the Supreme Court's pronouncement in Ford that in competency hearings "the 'evidence' will always be imprecise." Ford, 477 U.S. at 417. Dr. Merikangas testified variously that:

> "In my opinion, Mr. Coe is aware of his impending execution and the reasons for it." (Tr. 162)
>
> "I think he lacks the mental capacity to understand the execution and reasons for it." (Tr. 190)
>
> "I agree that he is aware of an execution. My point is he does not have the mental capacity to understand." (Tr. 207)
>
> "I agree . . . that he realizes that he was sentenced to die for the murder of a young girl". (Tr. 208)
>
> "[H]e lacks the mental capacity to understand why he is being put to death. To him it is not a punishment." (Tr. 243)

Dr. Merikangas diagnosed Coe as a brain-damaged chronic paranoid schizophrenic. (Tr.

168) He opined that, based upon those diagnoses, Coe will be incompetent to be executed on March 23, 2000. (Tr. 168) He further predicted, "I think he's incompetent now, but I think that as the time draws nigh, he will be blatantly and clearly to everyone incompetent." (Tr. 163) Importantly, in connection with his diagnosis, Dr. Merikangas stated that, "His thought that people are out to get him, though, is not a delusion. I mean that's reality." (Tr. 113) He further stated, "you can be schizophrenic and be competent" (Tr. 169), and "there are people who look like raving mad men who are competent to be executed." (Tr. 165) He conceded that his fellow defense expert, Dr. Kenner, did not diagnose Coe as a paranoid schizophrenic. (Tr. 195) In commenting upon Dr. Kenner's diagnosis of dissociative identity disorder ("DID"), Dr. Merikangas stated, " the dissociation means you're no longer in contact with your usual reality, and that's something that can happen to all kinds of people under stress, generally under stress." (Tr. 122)

Given Dr. Merikangas' credentials, his defensiveness and testiness on cross-examination are puzzling. When the state's counsel asked him for help in pronouncing a difficult medical term, Dr. Merikangas responded, "I'm not going to help you, sir." (Tr. 221) See also Tr. 251 ("So ask a question if you want") and Tr. 253-54 ("I think it's bizarre behavior to have a man locked in a little room and just note these things for you to infer that that means something.")

The trial court found that Dr. Merikangas' inconsistent statements and uncooperativeness on cross examination "somewhat diminished" his credibility. (Trial Ct. Op. at 3) Under Van Tran, the trial court is mandated to assess the credibility of the expert witnesses. See Van Tran, 6 S.W.3d at 271. Having viewed the videotapes of Dr. Merikangas' testimony and read the transcript of that testimony, this court comes away with a similar impression.

2. *Dr. William D. Kenner*

Dr. Kenner was the next expert witness for Coe. He qualified as an expert in psychiatry. (Tr. 285) He teaches at Vanderbilt University School of Medicine and St. Louis Psychoanalytic Institute and has a private psychiatry practice in Nashville, Tennessee. (Trial Ex. 5) He has testified for both the prosecution and the defense in criminal trials (Tr. 281-82) and has done many competency evaluations, usually for the court. (Tr. 284)

Dr. Kenner evaluated Coe on four occasions – December 22, 1999, January 10, 2000, January 11, 2000, and January 12, 2000. (Tr. 290) On two of those occasions, Dr. Kenner found Coe competent to be executed, and on two he found Coe incompetent to be executed. Dr. Kenner's evaluation highlights a concern expressed by Justice O'Connor in her opinion in Ford:

> Regardless of the number of prior adjudications of the issue, until the very moment of execution the prisoner can claim that he has become insane sometime after the previous determination to the contrary. . . . These difficulties, together with the fact that the issue arises only after conviction and sentencing, convince me that the Due Process Clause imposes few requirements on the States in this context.

Ford, 477 U.S. at 429.

Dr. Kenner found Coe not competent to be executed in his first interview on December 22, 1999 because, "he was unable to understand the reason for his execution." (Tr. 299) On January 10, 2000, Dr. Kenner found him "improved significantly" and stated that "he was competent to be executed at that time." (Tr. 302) On January 11, 2000, Dr. Kenner once again found Coe incompetent to be executed because he was "dissociated." It was as a result of this interview that Dr. Kenner diagnosed Coe with DID.

DID causes a person to go into another identity when "faced with a significant stress."

(Tr. 327) It sometimes eventually goes away and can be treated by therapy in a safe environment. (Tr. 343-44) It takes an average of six to seven years to diagnose (Tr. 391), but with Coe it took over twenty-five years to diagnose, even though he has been in institutional settings of one kind or another for almost that entire period of time. (Tr. 367, 794)

What caused Coe to "dissociate" into another identity during the January 11 interview was a letter he had just received. (Tr. 323, 367) The letter was from Michael Saripkin, an inmate at another institution. The letter threatens to have Coe killed by Saripkin's friends at Riverbend if Coe is not executed. (Trial Ex. 6) One paragraph of the letter describes Saripkin's desired rape of Coe in graphic and obscene detail. Dr. Kenner explained that this letter caused Coe to go into his other identity because it "describes things that are very similar to what actually happened to Robert in childhood." (Tr. 326) Coe was apparently subjected to significant sexual abuse by his father, and it was during these times that he would "dissociate" into another identity so that he could make believe that he was not suffering the abuse that he actually was. (Tr. 326-27; Trial Ex. 4) Dr. Kenner went on to state that people with DID "typically dissociate around specific issues." (Tr. 366) The issues for Coe are "somebody threatening him, threatening his physical integrity, threatening to abuse him in some way." (Tr. 366) All of this is logical, sensible and comprehensible. It is Dr. Kenner's next step or "leap" about which this court, the trial court and the Tennessee Supreme Court all are somewhat skeptical.

Dr. Kenner opined that at the time of execution, Coe would be incompetent to be executed because he would "dissociate;" the execution would represent a "threat against his physical integrity" that would cause the dissociation (Tr. 326-328) This prediction does not ring true. There is much proof in the record that Coe looks forward to his execution, looks forward to

dying and sees it as a release. (Tr. 728-29, 1087, 1109) There is proof that he wants his lawyers to stop fighting the competency fight and allow him to be executed. (Tr. 362) These attitudes on his part make Dr. Kenner's equating the approaching execution to the threatening Saripkin letter invalid. The letter threatened the kind of graphic sexual abuse allegedly suffered by Coe at the hands of his father as a child,[15] which may have caused him to create another identity into which to "dissociate" when under that kind of stress. Dr. Kenner's own words reinforce this court's skepticism of Dr. Kenner's conclusion that the approaching execution will cause Coe to "dissociate." After testifying that psychiatry is an "art" as opposed to "an exact science," Dr. Kenner stated:

> I think what we're looking at here, though, is that if you look at the kind of stressers, for example, someone who has been in combat and who has dissociative identity disorder as a result of that, if you put them in a situation that reminds them of combat, then it's going to bring about a recurrence of those symptoms, because those symptoms spare them from having to experience first hand the anxiety and pain that come with feeling like they're back in combat.

(Tr. 396)

Dr. Kenner found Coe competent to be executed during his last visit on January 12, 2000 and stated further, "He's competent to be executed on a good day." (Tr. 361-62) Dr. Kenner further stated that you could have a mental illness and still be competent to be executed. (Tr. 295)[16]

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[15]Coe told Dr. Matthews that his father was abusive, but did not extend this to sexual abuse. (Tr. 723)

[16]This is an extremely important conclusion, in that so much of the testimony at the hearing concerned which mental illness diagnosis, if any, was accurate and whether or not Coe

3. *Dr. Daryl Bruce Matthews*

Dr. Matthews testified as an expert witness in forensic psychiatry for the State. (Tr. 701) He confines his practice to forensic psychiatry and has been hired more by the defense than by the prosecution. (Tr. 802) He teaches at the University of Hawaii School of Medicine and is co-director of the forensic psychiatry training program at Tripler Army Medical Center in Hawaii. (Tr. 694-95)

Dr. Matthews conducted a lengthy interview with and evaluation of Coe on January 8, 2000 over the course of nearly five hours. (Tr. 702) He concluded that Coe has "the capacity to understand the pendency of his execution and the reasons for it." (Tr. 703) "He's aware that he was arrested for murder and he's aware that he's alleged to have killed a girl." (Tr. 736) Coe told him in the interview, "The judge said I was guilty. The judge did say I was going to die. They say the reason is murder. The judge said that's the reason." (Tr. 736) He further testified that "Mr. Coe understands that he is going to be executed and I believe he understands the reason for it. . . . I think he is perfectly capable of understanding both things, and I think he demonstrated it yesterday [in court] and demonstrated it over our exam and demonstrated it over the years." (Tr. 798-799)

Dr. Matthews disagreed with Dr. Merikangas' diagnosis that Coe is schizophrenic. (Tr. 786-789). He pointed out that Dr. Herb Meltzer, "one of the foremost experts on schizophrenia in the United States" who was retained by the defense to examine Coe, found him not to be

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was "malingering" (faking) mental illness. It also undercuts the petitioner's assertion that the trial court's decision is defective because it does not settle upon exactly which diagnosis Coe carries.

schizophrenic. (Tr. 790) Dr. Matthews expressed skepticism at Dr. Kenner's diagnosis of DID based upon the fact that Coe has been under almost continuous observation in various institutions since 1975 without this diagnosis being made. (Tr. 794)

Dr. Matthews did not find Coe to be psychotic at the time he examined him but did not "foreclose the possibility that he will be psychotic in the future." (Tr. 820) With his borderline personality, the stress of his impending execution "may make it possible" for him to become psychotic. (Tr. 821) However, it is Dr. Matthews' opinion that it is not possible to predict that Coe will become incompetent as his execution approaches

> I think that there are individuals that I could look at now who would be incompetent now, who I could predict would be incompetent at some future time and possible [sic] there would be individuals who would be competent now who you could predict would be incompetent at some future time. So for example, if there was someone who was really a schizophrenic person who had been incompetent in some way and was effectively treated with medication to make that person competent, and then they were going off the medication, and you might predict that as a result of being off that medication, that they might be incompetent. But an individual with a personality disorder who has not been clearly incompetent or psychotic in the past, and someone with these kinds of features, I don't believe you can predict that they would be incompetent. I think that that's an over prediction

(Tr. 842-43)

Dr. Matthews diagnosed Coe with antisocial personality disorder. (Tr. 754) and borderline personality disorder (Tr. 772-774)[17]

4. *Dr. Daniel A. Martell*

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[17]Dr. Matthews witnessed Coe's "motivated, voluntary, conscious, highly manipulative display" in the courtroom and stated that it was "classic for people with borderline personality disorder to do this kind of thing." (Tr. 781)

Dr. Martell testified as an expert forensic neuropsychologist for the State. (Tr. 885) He does private forensic consultation for both defense and prosecution, but the majority of his work is for the prosecution. (Tr. 993) On January 8 and 9, 2000, he gave Coe a battery of tests for four and one-half hours, and he also watched the evaluation of Coe by Dr. Matthews for nearly five hours. (Tr. 887)

After Dr. Martell's interview with Coe and Dr. Matthews' interview with Coe, Dr. Martell concluded "that he does understand the fact of impending execution, and that he does understand the reason for it. Although he takes issue with his guilt." (Tr. 926) He related that Coe "was able to state that he had been sentenced to die for the murder of a young girl." (Tr. 927)

5. *Dr. James Stanley Walker*

Dr. Walker testified in rebuttal for the petitioner as an expert in forensic neuropsychology. (Tr. 1069) He is a clinical assistant professor of neurology at Vanderbilt University Medical Center. (Tr. 1064) At Dr. Meltzer's request (Tr. 1069), on December 23 and 24, 1999, Dr. Walker administered many of the same tests that Dr. Martell had administered and conducted a two or three hour interview with Coe. (Tr. 1072, 1082, Trial Ex. 14)

Dr. Walker diagnosed Coe with pseudologicafantastica, a symptom of mental illnesses like borderline personality disorder, but not of schizophrenia. (Tr. 1090-91) With this syndrome, people are unable to inhibit representing themselves to others. (Tr. 1076) Dr. Walker did not find any evidence of psychosis in Coe when he interviewed him or in his medical records going back to 1996. (Tr. 1107) Dr. Walker's self-described "careful interview" of Coe (Tr. 1108) revealed:

> He is aware that his execution is impending. He demonstrated an awareness of execution as a penalty imposed by society for certain crimes. . . . He indicated understanding of the fact that his sentence has been imposed due to the conviction for a crime. . . . His thinking appeared logical during this interview and his manner was somewhat less flippant and superficial. . . . Cognitively, Mr. Coe understands the concept of the death penalty in the abstract and its existence as a penalty for misdeeds. He retains memories of his trial and legal proceedings since his trial and he can explain many or most of the issues involved. He is aware that he's been accused of a crime, and the death penalty has been imposed for that crime. . . . In sum, while his abilities to think, understand, and perhaps even to monitor or regulate his behavior in given situations may reflect some impairment, he still has a basic understanding of his situation and the capacity to act in his best interest if he chooses to do so.

(Tr. 1108-1112) Dr. Walker expects that Coe will "deteriorate" as the execution approaches but it is impossible to predict in what way he will deteriorate or to say necessarily that he will become psychotic. (Tr. 1112) He disagrees with Dr. Kenner's prediction that Coe will dissociate into a psychosis as the execution approaches. (Tr. 1101) Dr. Walker's report states:

> With regard to his own prediction of his behavior, I also questioned Mr. Coe closely about the future. I went into some unpleasant, stressing detail to test his tolerance for imaging the details of his execution, but elicit no concern on his part that he might deteriorate nor did I observe any deterioration in response to my interview

(Trial Ex. 14 at 9)

6. *Dr. John W. Pruett*

Dr. Pruett, a psychiatrist who treated Coe at Riverbend from 1994-97, also testified for the petitioner in rebuttal. He was qualified to testify as an expert in psychiatry. (Tr. 1042-43)

Dr. Pruett did not give an expert opinion about Coe's competency to be executed. He testified that Dr. Kenner's diagnosis of DID "makes sense." (Tr. 1034) He testified that Coe

could be malingering "in some aspects and still be mentally ill." (Tr. 1040) He testified that schizophrenia can be confused with DID (Tr. 1041) but that Dr. Merikangas' diagnosis of schizophrenia was "reasonable" based upon his report. (Tr. 1043) He further testified that Coe's brain abnormalities are consistent with schizophrenia and "a lot of other conditions too." (Tr. 1044)

For this court to grant this application for a writ on the ground that Coe is not competent to be executed, this court must find the conclusions reached by the trial court and the Tennessee Supreme Court as to Coe's competency to be executed to be "so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that [they are] outside the universe of plausible, credible outcomes." Nevers, 169 F.3d at 362. This court cannot make that finding and, therefore, this ground for the petition must be denied.

B. *Petitioner was denied due process under the Sixth, Eighth and Fourteenth Amendments by the state courts.*

For any of these due process claims to be a ground for the granting of a writ of habeas corpus by this court, this court must find that the Tennessee Supreme Court's decision adjudicating them was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1). This court finds that none of petitioner's claims meet that standard for the reasons discussed hereafter. His allegations are many and detailed. For ease of cross-reference to the petition (Docket No. 1), the numbering system used in the petition will be used.

62. *The trial court did not conduct a "fully adversarial" trial on Coe's competency.*

Ford states that, in a proceeding to determine a prisoner's competency to be executed, the

"factfinder must 'have before it all possible relevant information about the individual defendant whose fate it must determine.'" Ford, 477 U.S. at 413 (citations omitted). The Court went on to state: "The stakes are high, and the 'evidence' will always be imprecise. It is all the more important that the adversary presentation of relevant information be as unrestricted as possible." Id. at 417. In specifying that a full, adversary proceeding is not required, the Court stated: "We do not here suggest that only a full trial on the issue of sanity will suffice to protect the federal interests; we leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." Id. at 416-17.

The Tennessee Supreme Court, in its effort to set out procedures for dealing with the competency of prisoners to be executed in conformance with the Ford standard, provided that the basics of procedural due process would apply to the hearing but specifically held, "... rules of evidence should not be applied to limit the admissibility of reliable evidence that is relevant to the issue of the prisoner's competency." Van Tran, 6 S.W.3d at 271.

These parameters informed the trial judge's rulings on the admissibility of evidence and conduct of the hearing. However, unlike the manner in which many trial judges conduct bench trials and would have conducted this proceeding, Judge Colton asked very few questions of the witnesses, scrupulously sought out the positions of both sides before ruling on contested matters and did not intrude on the presentation of the case by the lawyers. See Docket No. 12, Trial Transcript and videotapes. His clear goal, however, was to receive for his own consideration all evidence that bore any relevance to the determination of the petitioner's competency to be executed, as required by both the United States Supreme Court and the Tennessee Supreme Court.

The trial was as "fully adversarial" as it needed to be under Ford and Van Tran.

63–64. *The trial court violated due process by forcing the disclosure of reports and other data generated by petitioner's court-appointed experts, which was then relied upon by the Court in making its decision, despite the fact that much of it was never introduced into evidence at the hearing.*

The Tennessee Supreme Court dealt with these issues at length in its opinion upholding the trial court's decision, see Coe v. State, 2000 WL 246425, at *17-19, and this court will not repeat its marshaling of the facts and reasoning.

In finding that the disclosure of these expert reports did not violate due process, the court stated that "'[s]ince the only issue in a competency proceeding is the prisoner's mental state, full reciprocal disclosure of experts appointed to assist either party does not offend basic notions of due process.'" Coe v. State, 2000 WL 246425, at *18.[18] It is clear that the disclosure of expert reports was contemplated in Van Tran and in Ford. As stated in Van Tran, "the prisoner and the State should freely disclose to each other all information relating to the prisoner's competency as this proceeding may be, in a very real sense, the last avenue of reprieve available to an inmate sentenced to death." Van Tran, 6 S.W.3d at 270 n.14. In Ford, the majority noted that, in light of the significant interests at stake, "[i]t is all the more important that the adversary presentation of relevant information be as unrestricted as possible. Also essential is that the manner of

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[18]The Tennessee Supreme Court cited as support two state statutes that have essentially codified this full disclosure of expert reports for purposes of competency proceedings. See Ariz.Rev.Stat.Ann. §13.4022(C) ("[t]he parties shall also disclose to the appointed experts and to each other the names and addresses of any other previously undisclosed mental health experts who have examined the prisoner and the results of the examinations"); Tex.Crim.P.Code Ann. §46.04(j) (in competency proceeding, prisoner "waives any claim of privilege with respect to, and consents to the release of, all mental health and medical records relevant to whether the [prisoner] is incompetent to be executed").

selecting and using the experts responsible for producing that "evidence" be conducive to the formation of neutral, sound, and professional judgments as to the prisoner's ability to comprehend the nature of the penalty." Ford, 477 U.S. at 417. As for the contention that the trial court improperly considered the reports of experts who did not testify, this claim has no merit. All evidence relevant to the issue of the petitioner's competency to be executed should have been considered. See *infra* discussion relating to ¶68.

The trial court record reveals additional support for denying the petition on this ground. Petitioner's expert witness, Dr. Merikangas[19] testified at length on direct examination by petitioner's lawyer about Dr. Meltzer's report, thereby placing it in evidence through his testimony and providing the trial court with the petitioner's interpretation of Dr. Meltzer's findings. (Tr. 152-58; see also Tr. 226-28) Dr. Merikangas also commented upon aspects of Dr Auble's report (Tr. 208),[20] as did Dr. Matthews (Tr. 747, 750) and Dr. Martell (Tr. 888).

The petitioner's due process rights were not violated by the disclosure of the expert reports and the trial court's consideration of reports of those experts who did not testify.

65. *The trial court precluded full consideration of evidence relevant to the competency determination.*

a-1. *The petitioner was unable to present expert testimony concerning*

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[19]Dr. Herbert Meltzer, a "foremost expert" in schizophrenia, was hired to be an expert witness for Coe. He did not find Coe to be schizophrenic and was not called to testify. (Tr. 790)

[20]From the trial court transcript, it appears that all of the expert witness reports and data were being kept on a table in or near the courtroom for easy access by all counsel and experts during the trial. This included those of experts not called to testify. Some were marked as specific numbered exhibits at trial, but all of this material was available for the use of the trial court and was part of the record in the case. See Tr. 171; Coe v. State, 2000 WL 246425, at *n.13.

malingering because the Court denied his motion for a continuance made at the start of the hearing.

The Tennessee Supreme Court ruled on this issue, see Coe v. State, 2000 WL 246425, at *21, and petitioner has not met the standard of review that would cause this court to sustain the petition on this ground.

As to the issue of whether Petitioner was malingering mental illness in order to avoid execution, the trial court correctly noted that the "the ultimate determination of Petitioner's competency for execution is a legal issue, not a mental health issue, and the ultimate question before this Court is not whether Petitioner is malingering mental illness, but rather, does Petitioner have the mental capacity to understand the fact of his impending execution and the reason for it." (Trial Ct. Op. at 23) See also Coe v. State, 2000 WL 246425, at *21. Coe's own expert, Dr. Kenner, endorsed this view in his testimony. He answered, "Sure" to the question, "[Y]ou could have a mental illness and be competent to be executed or not be competent to be executed . . . ." (Tr. 295)

Furthermore, it is worth noting that petitioner's counsel was seeking a continuance because he was seeking to hire the "foremost experts" nationally in the field of malingering to testify on petitioner's behalf, and they were not available on short notice. At any rate, Dr. Matthews (at length) and Dr. Pruett both testified in rebuttal for Coe on the issue of malingering. (Tr. 17)

m-s *The Court denied a continuance sought by the petitioner so that he could secure the presence of Dr. Deal, a psychiatrist who once had treated him in prison.*

Another ground for the continuance motion at the beginning of the hearing was so that prison psychiatrists who had treated Coe in the past could be located and subpoenaed to come

and testify that he was clearly mentally ill and not malingering. Petitioner's counsel specifically mentioned two individuals, one who lived in Mississippi and was unavailable, and one who had agreed to come and testify. (Tr. 15-16) Dr. Deal, the witness for whose presence the petitioner needed a continuance, saw the petitioner in prison for only a six-month period in 1989. (Docket No. 6, Ex. 1) Dr. Pruett, a Board certified psychiatrist who treated the petitioner at Riverbend Penitentiary from 1994-97, testified in rebuttal for the petitioner, shoring up opinions advanced by Drs. Kenner and Merikangas and opining, "You could be malingering in some aspects and still be mentally ill." (Tr. 1040)

The denial of the motion to continue did not violate the petitioner's due process rights. See *supra* at ¶65a-l.

t-v. *The trial court violated due process by allowing the state's expert witnesses to remain in the courtroom to hear the testimony of the petitioner's experts when petitioner's experts did not have the same opportunity and by denying a continuance so that petitioner's experts could testify in rebuttal concerning Coe's disruptive behavior during the hearing.*

The Tennessee Supreme Court has correctly ruled on these issues, see Coe v. State, 2000 WL 246425, at *26-27, 32, and the petitioner has not met the standard that would require this court to sustain his petition on this ground. See also *infra*, discussion relating to ¶68.

w-ab. *Had a continuance been granted and Drs. Kenner and Merikangas been allowed to testify in rebuttal, they would have provided the court with additional important testimony.*

Most of the proffered additional testimony of Drs. Kenner and Merikangas, which is also a ground for petitioner's motion for evidentiary hearing, is supplemental closing argument. Most of the assertions are already contained in the record of the case, and it is clear that the trial judge carefully reviewed all of the medical evidence and testimony before issuing his opinion.

Accordingly, the denial of the continuance was not unreasonable or a violation of due process.

ac at. *The trial court should have appointed a pharmacologist/sexual abuse expert and a radiologist as additional expert witnesses.*

The Supreme Court correctly held that the petitioner was only entitled to the expert witnesses who were appointed, see Coe v. State, 2000 WL 246425, at *17. In addition, the proposed testimony which the petitioner proffers from these two experts is either cumulative of what was already admitted at the hearing and in the medical information provided to the court or irrelevant to the competency issue.

The failure to appoint these additional experts did not deny the petitioner due process.

au-aw. *The denial of a continuance to secure a handwriting expert violated due process.*

As stated by the Supreme Court in its ruling on this issue, the trial court made it clear that he was not relying upon statements allegedly made by Coe in a letter[2] to the victim's mother in making his competency determination. See Coe v. State, 2000 WL 246425, at *21. Therefore, this claim is without merit

ax.-bc *Petitioner was unable to present additional other evidence because of the "truncated time frame."*

Specifically, petitioner complains that due process was violated because he was not able

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[2]The state's handwriting expert was unable to provide a sufficient foundation for the admissibility of the letter, see Tr. 443-44, so Coe did not need an expert of his own. Moreover, the letter was admissible without any expert testimony. Petitioner's own witness, Steve Henley, the inmate who occupies the cell next to him at Riverbend Penitentiary, testified that the letter was in Coe's handwriting (Tr. 684-85) and that he helped him compose it. (Tr. 674-76) The letter appears relevant because it evidences the writer's awareness that he is about to be executed for the murder of Mrs. Stout's daughter. See Trial Ex. 8.

to present the testimony of other psychiatrists who had treated him over the years. However, petitioner's medical records dating back to at least 1975 were made available to all experts who testified, and there was lengthy testimony concerning his medical and mental health history. In addition, he was able to call as a witness in rebuttal Dr. John Pruett, a Board certified psychiatrist who had treated Coe at Riverbend from 1994-97.

Coe claims that he would have liked to have presented the testimony of other inmates and/or guards who had contact with him while in prison and who might have testified to behavior which they witnessed consistent with the diagnoses given to Coe by Drs. Kenner and Merikangas. However, petitioner was able to present the testimony of inmate Steve Henley, who has apparently been housed next to or close to Coe for 15 years. (Tr. 672) Henley was allowed to testify in response to questions about Coe becoming "disoriented" or acting "bizarre" (Tr. 679-682)

Petitioner complains of not being able to present testimony from family members, but petitioner's counsel made the decision not to call family members at the hearing. (Tr. 463-64) The petitioner's aunt's testimony concerning symptoms of brain damage would have been cumulative; Dr. Merikangas testified at length as to the physical and psychiatric indications of the petitioner's brain damage. Testimony from another inmate concerning petitioner's failure to recognize him on occasion would also have been cumulative to other testimony at the trial.

Throughout, the trial court made it clear that he would allow in any relevant proof that the petitioner wished to introduce:

> Well, I'm going to allow it, if they want, if they want to put it in--not going to keep you all from putting in any proof that you think is relevant.

(Tr. 464) Granting continuances to secure the additional proof catalogued here by the petitioner was not mandated by due process

66. *The trial court applied an incorrect standard of proof.*

In Van Tran, the Tennessee Supreme Court set forth the procedures to be followed in litigating the competency to be executed issue, stating that "in the wake of Ford, this Court has an affirmative constitutional duty to ensure than no incompetent prisoner is executed." Van Tran, 6 S.W.3d at 265. The court looked to Ford for guidance in establishing the standard of proof to be used in state proceedings. While Petitioner appears to argue that, in Van Tran, the Tennessee Supreme Court "articulated varying standards" for the proof required to establish competency to be executed, this court finds that the Tennessee Supreme Court in Van Tran followed Justice Powell's concurrence in Ford: the "Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it."[22] Ford, 477 U.S. at 422. Van Tran clearly held that it was adopting the "cognitive

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[22]Petitioner argues that the state court applied an incorrect standard because the state court only required that Petitioner have an "awareness" or "knowledge" of his impending execution and the reasons for it, rather than a "comprehension of the sentence and its implications." (Docket No. 1 at 44-46) This argument lacks merit. Petitioner's argument that "comprehension" is required is based on the statement in the majority opinion in Ford that "[i]t is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from *comprehending* the reasons for the penalty or its implications." Ford, 477 U.S. at 417 (emphasis added).

Despite this language, the test set forth in Justice Powell's concurrence comports with due process. In his concurring opinion, Justice Powell uses a variety of words to clarify the standard by which competency to be executed is to be evaluated. He first states that there is no dispute as to the need "to require that those who are executed *know* the fact of their impending execution and the reason for it." Id. at 422 (emphasis added). In the next sentence, in further elucidating this standard, he states that this standard "defines the kind of mental deficiency that should trigger the Eighth Amendment prohibition" and "[i]f the defendant *perceives* the connection between his crime and his punishment, the retributive goal of the criminal law is

standard for competency to be executed advanced by Petitioner requires that a prisoner have a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L.Ed.2d 824 (1960). Petitioner desires this higher standard, but Supreme Court law clearly does not mandate it.

As catalogued in Van Tran, many other states have adopted the "cognitive test" for competency to be executed. See Van Tran, 6 S.W.3d at 265. See also Ariz.Rev.Stat. §13-4021 ("unaware that he is to be punished for the crime of murder or that he is unaware that the impending punishment for that crime is death"); Fl.Stat.Ann. §922.07 ("whether he or she understands the nature and effect of the death penalty and why it is to be imposed upon him or her"); Ga. Code §17-10-60 ("unable to know why he or she is being punished and understand the nature of the punishment"); Md.Code Ann., Corr.Serv. §3-904 ("lacks awareness . . . of the fact of the inmate's impending execution; and . . . that the inmate is to be executed for the crime of murder"); N.Y. Correct. Law §656 ("lacks the mental capacity to understand the nature and effect of the death penalty and why it is to be carried out"); Ohio Rev.Code Ann. §2949.28 ("does not have the mental capacity to understand the nature of the death penalty and why it was imposed upon the convict"); Wyo.Stat.Ann. §7-13-901 ("ability to understand the nature of the death penalty and the reasons it was imposed").

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prong" in its competency to stand trial test. Id. (citing in part Berndt v. State, 733 S.W.2d 119, 123 (Tenn.Crim.App. 1987). While this "assistance prong" has been adopted by some states for purposes of whether an individual sentenced to death is competent to be executed, there is no due process requirement that this element be included in such a standard. See Miss.Code.Ann. §99-19-57(2)(b) (1994); Singleton v. State, 437 S.E.2d 53, 57-58 (S.C.1993), State v. Harris, 789 P.2d 60, 66 (Wash. 1990).

test" and articulated this test as follows: "under Tennessee law a prisoner is not competent to be executed if the prisoner lacks the mental capacity to understand the fact of his impending execution and the reason for it."[23] Van Tran, 6 S.W.3d at 266.

Petitioner argues that the "cognitive test," articulated in Van Tran and based on Justice Powell's concurrence in Ford, is not the proper test because, "this is a minimalist standard which is wholly inconsistent with a long history of competency and sanity jurisprudence."[24] (Docket No. 1 at 45) In Petitioner's view, the proper test to be applied is the test for competency used at common law and at all other stages of criminal proceedings.[25] (Docket No. 1 at 45-8) The

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satisfied. And only if the defendant is *aware* that his death is approaching can he prepare himself for his passing." Id. at 423 (emphasis added). Then in the next sentence, Justice Powell states his holding that "the Eighth Amendment forbids the execution only of those who are *unaware* of the punishment they are about to suffer and why they are to suffer it." Id. (emphasis added).

[23]In Ford, Justice Marshall, speaking for the majority of the Court, did not define what would constitute insanity in the context of execution. In his concurrence, Justice Powell indicated that he wrote separately in part because with respect to the "meaning of insanity in this context, . . . [t]he Court's opinion does not address the first of these issues . . . ." Ford, 477 U.S. at 418.

[24]In reviewing Petitioner's state court competency proceeding, the Tennessee Supreme Court noted that the Ford majority had "failed to articulate the legal definition of insanity in the execution context," and that the opinion of Justice Powell "reflects the narrowest grounds for the Court's judgment and is controlling on the state courts and lower federal courts." Coe v. State, 2000 WL 246425, at *12 (Tenn. Mar. 6, 2000) (citing Marks v. United States, 430 U.S. 188, 193, 97 S. Ct. 990, 993, 51 L.Ed.2d 260 (1977)). In Marks, the Supreme Court stated that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." Marks, 430 U.S. at 193 (citing Gregg v. Georgia, 428 U.S. 153, 169 n.15, 96 S. Ct. 2909, 49 L.Ed.2d 859 (1979)). See also Coe v. Bell, 161 F.3d 320, 354 (6th Cir. 1998).

[25]In the dissent in Van Tran, Justice Birch stated that he believed that the proper standard for competency to be executed should include an "assistance prong." Van Tran, 6 S.W.3d at 275. Under common law, this "assistance prong" would require that the individual be able to consult with and assist counsel. As Justice Birch notes, Tennessee currently includes this "assistance

standard for competency to be executed advanced by Petitioner requires that a prisoner have a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L.Ed.2d 824 (1960). Petitioner desires this higher standard, but Supreme Court law clearly does not mandate it.

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Furthermore, in Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct. 2934, 106 L.Ed.2d 256 (1989), the United States Supreme Court, in holding that the execution of mentally retarded persons is not "categorically prohibited" by the Eighth Amendment, found that there was a distinction between the execution of the mentally retarded and the execution of the insane and cited the standard set forth in Justice Powell's concurrence. See Penry, 492 U.S. at 333. Thus, even the Supreme Court has cited this standard for competency to be executed. See also Cox v. Norris, 167 F.3d 1211, 1212 (8th Cir. 1999) (adopting the Justice Powell standard as the Ford criterion); Lowenfield v. Butler, 843 F.2d 183, 187 (5th Cir. 1988) (same).

Petitioner also argues that the standard as set forth in Van Tran violates the Eighth and Fourteenth Amendments because the Van Tran standard for determining competency to be executed is a "conjunctive standard [that] requires a petitioner to prove both an 'unawareness' of the execution, as well [as] an 'unawareness' of the reason for the execution. With the petitioner bearing the burden of proof under Tennessee law, this means that a petitioner who was 'aware' of the punishment, but not aware of the reason for it would still be subjected to execution."[26] (Docket No. 1 at 43) While Petitioner's assertion may technically be true, it is clear that *as applied* to the facts of this case, both the trial court and the Tennessee Supreme Court would not have found Coe competent if he had only been aware of his impending execution but had not been aware of the reason for it. Indeed, Ford would appear to prohibit an execution in such a circumstance. Thus, while both courts stated that the burden was on the petitioner to establish

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[26]Although this issue was not addressed by the Tennessee Supreme Court in Coe v. State, 2000 WL 246425 (Tenn. Mar. 6, 2000), Petitioner did appear to raise this issue in his brief to that court. See Docket No. 12, Addendum 2, Document 2A, at 45 n.12.

his incompetence to be executed by a preponderance of the evidence, these courts found that the petitioner was both aware of his impending execution and the reasons for it

This court finds that the standard for competency to be executed as articulated in Van Tran does not violate the Eighth and Fourteenth Amendments to the United States Constitution and is in keeping with the requirements of Ford.

Petitioner next argues that in the state court competency hearing, the trial court used a lower standard than that permitted under Van Tran. (Docket No. 1 at 43)

In finding Petitioner competent to be executed, the trial court stated,

> Throughout all the testimony given, one fact has been constant; that Petitioner realizes he is facing execution, and that he knows it is because he has been convicted of murdering a little girl. Although he maintains his innocence, *it has been made quite clear to this Court that Petitioner understands that he was found guilty of the murder and was sentenced to die.* Furthermore, even in light of the myriad of mental health diagnoses given Petitioner, the fact that Petitioner knows he is facing execution for the murder of a young girl was repeated by each and every mental health expert. In light of this fact, this Court has no choice but to find that Petitioner is competent to be executed, in accordance with the standard set forth in Van Tran.

(Trial Ct. Op. at 27-28 (emphasis added)) Petitioner contends that the trial court did not apply Van Tran in finding him competent to be executed because the trial court "determined Robert Coe's competency based upon mere *knowledge* that an execution was to occur because of the death of a young girl." (Docket No. 1 at 44) Petitioner's argument is not well taken. Reading the last paragraph in full, it is clear to this court that Judge Colton referred to the Van Tran

v. State, 655 So.2d 1, 15 (Miss. 1995), Singleton v. State, 437 S.E.2d 53, 60 (S.C. 1993); State v. Perry, 502 So.2d 543, 564 (La. 1987)

While the issue of competency to be executed is very different from other matters of competency, Supreme Court precedent in other burden of proof cases is instructive.[28] In Medina v. California, 505 U.S. 437, 112 S. Ct. 2572, 120 L.Ed.2d 353 (1992), the Supreme Court held that California law that presumed the defendant was competent to stand trial and that placed the burden of proving incompetence on the defendant asserting incompetence did not violate due process.[29] More recently, in Cooper v. Oklahoma, 517 U.S. 348, 116 S. Ct. 1373, 134 L.Ed.2d 498 (1996), the Supreme Court held that Oklahoma law that presumed that a defendant was competent to stand trial unless the defendant proved his incompetence by clear and convincing evidence was a violation of due process, but it was the clear and convincing standard that troubled the court, not placing the burden of proof on the defendant. See Cooper, 517 U.S. at 366. Here, the state has placed the burden on the individual sentenced to death to prove incompetence by a preponderance of the evidence standard. While there are different interests at stake in the competency to be executed context, in light of these precedents, the court finds that the burden of proof standard in Van Tran does not violate due process.

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[28]In his petition, Petitioner cites to Addington v. Texas, 441 U.S. 418, 425, 99 S. Ct. 1804, 1809, 60 L.Ed.2d 323 (1979); Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L.Ed.2d 18 (1976) for the proposition that "burdens of proof are designed to allocate the risk of error in light of the competing interests at stake." (Docket No. 1 at 49)

[29]In Medina, the Supreme Court stated that "[o]nce a State provides a defendant access to procedures for making a competency evaluation," there is "no basis for holding that due process further requires the State to assume the burden of vindicating the defendant's constitutional right by persuading the trier of fact that the defendant is competent to stand trial." Medina, 505 U.S. at 449.

Petitioner asserts that the "Eighth Amendment properly demands that the burden be placed upon the state, especially since the defendant's life is at stake, and the state has no legitimate policy reason for executing the insane."[30] (Docket No. 1 at 49) The court recognizes that the due process concerns are significant in such a case for, as stated in Ford, "execution is the most irremediable and unfathomable of penalties [–] death is different." Ford, 477 U.S. at 411. Nevertheless, the competency to be executed proceeding occurs after the individual has been found guilty of a crime and has been sentenced to death for it. Thus, as the majority of the Supreme Court recognized in Ford, the individual sentenced to death "does not enjoy the same presumptions accorded a defendant who has yet to be convicted or sentenced . . . ." Id. In a similar vein, Justice Powell stated that "[t]he State may therefore properly presume that petitioner remains sane at the time sentence is to be carried out, and may require a substantial threshold showing of insanity merely to trigger the hearing process." Id. at 426. Other than these guidelines, Ford does not address who must carry the proper burden of proof in a competency to be executed proceeding.

The court finds that Petitioner's argument fails and that the assignment of the burden of proof and the requirement that Petitioner establish his own incompetency by a preponderance of the evidence does not violate the Eighth and Fourteenth Amendments.

68. *Petitioner was denied due process when the trial court failed to exclude expert*

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[30]Petitioner has also asserted that the burden of proof being on the state is also necessary under the facts of this case. Petitioner states that "[w]ith there having been proof that Robert Coe's mental state fluctuates, it is proper for the state to prove that Robert [Coe] is lucid and competent, rather than having Robert [Coe] prove that he is incompetent." (Docket No. 1 at 49) The court does not agree that a fluctuating mental status should have an impact on who has the burden of proof.

witnesses from the courtroom during the competency hearing pursuant to Tenn.R.Evid. 615.[31]

Prior to calling the first witness, Petitioner's counsel asked for the exclusion of all witnesses. (Tr. at 57) Although the court granted the request, the state asked that its expert witnesses, Dr. Martell and Dr. Mathews, be allowed to remain in the courtroom.[32] Petitioner objected in light of the fact that his expert witnesses would not able to remain in the courtroom during the testimony of the state's expert witnesses. (Tr. at 60) The trial court ruled that the expert witnesses of both the state and the defense would be permitted to stay in the courtroom throughout the competency hearing "in an effort to get to the truth of this matter, and . . . for the Court to give a proper finding in the case." (Tr. at 61)

Although Van Tran does not expressly address the issue of whether experts should be allowed to remain in the courtroom for the entirety of the competency hearing, Van Tran does

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[31]Rule 615 of the Tennessee Rules of Evidence states:

> At the request of a party the court shall order witnesses, including rebuttal witnesses, excluded at trial or other adjudicatory hearing. In the court's discretion, the requested sequestration may be effective before voir dire, but in any event shall be effective before opening statements. The court shall order all persons not to disclose by any means to excluded witnesses any live trial testimony or exhibits created in the courtroom by a witness. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) a person designated by counsel for a party that is not a natural person, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause. This rule does not forbid testimony of a witness called at the rebuttal stage of a hearing if, in the court's discretion, counsel is genuinely surprised and demonstrates a need for rebuttal testimony from an unsequestered witness.

[32]The Advisory Commission Comments to Rule 615 alludeto the common practice of expert witnesses qualifying as persons "essential to the presentation of the party's cause" who, therefore, may remain in the courtroom

caution that "[a]ny procedure that unreasonably precludes the prisoner from attending and 'presenting material relevant to [the question of] his sanity or bars consideration of that material by the factfinder is necessarily inadequate." Van Tran, 6 S.W.3d at 271 (citing Ford, 477 U.S. at 414). In seeking to ensure consideration of all material relevant to the issue of competency, Van Tran held that "the rules of evidence should not be applied to limit the admissibility of reliable evidence that is relevant to the issue of the prisoner's competency." Van Tran, 6 S.W.3d at 271. Thus, Judge Colton did not act outside the bounds of Van Tran by allowing the expert witnesses to remain in the courtroom during the competency hearing.

In addressing this claim, the Tennessee Supreme Court, found that, because the United States Supreme Court stated in Ford that "the adversary presentation of relevant information should be as unrestricted as possible," Ford, 477 U.S. at 417, the sequestration rule did not apply to the competency hearing. Coe v. State, 2000 WL 246425, at *26. The Tennessee Supreme Court also held that the ruling did not violate Petitioner's due process rights because the rule was applied to both parties equally. Id. at *27.

The court finds Petitioner's arguments somewhat specious. While Petitioner may argue that he was harmed by the trial court's ruling,[23] the trial court explicitly held that the expert witnesses for both the state and for the petitioner would be allowed to remain in the courtroom. There was no attempt to prejudice the petitioner. While Petitioner complains that the state refused to put on its proof first so that Petitioner would not be disadvantaged by the fact that his

[23]Apparently, Petitioner's expert witnesses were unable to attend the entire competency hearing due to the commitments of private practice. (Docket No. 1 at 51) However, Dr. Merikangas was still in attendance on the third day of the hearing and testified about the gagging procedure. (Tr. 452, 533)

expert witnesses could not remain for the entire competency hearing. Petitioner makes the bald assertion that "the state did this solely to skew the truthfinding process." (Docket No. 1 at 50) Petitioner provides no support for this statement and there is no constitutional requirement that the party without the burden of proof must put on its proof first in order to accommodate the party with the burden.

Petitioner has not demonstrated that the trial court's decision to allow all expert witnesses to remain in the courtroom was a violation of due process.

69a-c. *Petitioner's counsel were not permitted to be present during his evaluations by State experts and the Court did not require videotaping of the State's evaluations, thus depriving the petitioner of cross-examination material.*

As ruled by the Tennessee Supreme Court, the petitioner had no right to have his counsel present or have the examinations videotaped. See Coe v. State, 2000 WL 246425, at *16. In the trial court's Order so ruling, the parties were ordered to file their expert witness reports on January 13, 2000 and, on the same day, provide to the opposing party each witness's "entire evaluation file, including all raw data, notes and test materials" (Docket No. 12, Vol. I at 93), which material was extensively used during the testimony of petitioner's experts.

In Van Tran, the Tennessee Supreme Court stated that "the prisoner must be afforded an opportunity to be heard and to present evidence relevant to the issue of competency at an adversarial proceeding at which the prisoner is entitled to cross-examine the State's witnesses." Van Tran, 6 S.W.3d at 271. See also Ford, 477 U.S. at 415 ("Cross-examination of the psychiatrists, or perhaps a less formal equivalent, would contribute markedly to the process of seeking truth in sanity disputes by bringing to light the bases for each expert's beliefs, the precise factors underlying those beliefs, any history of error or caprice of the examiner, any personal bias

with respect to the issue of capital punishment, the expert's degree of certainty about his or her own conclusions, and the precise meaning of ambiguous words used in the report.") It is clear from this court's review of the trial court proceeding that Petitioner had every opportunity to cross-examine the State's expert witnesses.

Thus, the fact that counsel was not permitted to attend the examinations and that the examinations were not videotaped did not deprive Petitioner of due process.

d-g. *The trial court allowed into evidence oral statements made by the petitioner to prison guards, when the statements had not been provided to petitioner's counsel in advance.*

Petitioner's counsel filed a discovery motion five days before the hearing requesting, among other things, ". . . the substance of any oral statement which the State intends to offer in evidence at the trial made by the defendant whether before or after arrest *in response to interrogations by any person then known by the defendant to be a law enforcement officer.* T.R.Crim.P. 16(a)(1)(A)." (Docket No. 12, Vol. 1 at 95-99) (emphasis added) The petitioner's motion tracked the language of Rule 16(a)(1)(A) of the Tennessee Rules of Criminal Procedure. Three days later, and six days prior to the hearing, the trial judge granted the motion, ordering in part that "any information subject to disclosure as set forth in Tenn. R. Crim. P. 16" be provided by both parties. (Docket No. 12, Vol. 1 at 150)

On at least two occasions during the competency hearing, prison guards testified to statements made to them by petitioner. (Tr. 578-81, 629-34) These statements do not come within the rule, in that prison guards are not law enforcement officers, and they were not "interrogating" the petitioner at the time the statements were made. There were no written accounts of these statements, according to the State, and the State had provided petitioner's

counsel with the name of both prison guards prior to the hearing, so that they could be interviewed. (Tr. 580, 629)

As noted by the State, this claim was not presented to the Tennessee Supreme Court and is, therefore, procedurally defaulted. Even were it not, it is without merit.

70. *The trial judge was not an "impartial arbiter."*

Petitioner claims that the trial judge's gagging of him during the proceedings indicated a lack of impartiality. The transcript and videotapes supplied to this court reveal, however, that the trial judge dealt with this challenging development with the utmost fairness, patience and dignity. Not only did the petitioner hurl obscene and lewd insults and threats at the witnesses, judge, attorneys and other persons present in the courtroom, but he told the trial judge specifically, "I will beat your goddamn brains out punk" (Tr. 504), and "I'll have some of my kin folks over there to kill your whole goddamned family" (Tr. 566). He also spat on one of the State's attorneys (Tr. 501-2). Not once did the trial judge even admonish the petitioner, let alone show anger toward him. Also, he never asked Coe's counsel to try to get him under control.[34]

The Tennessee Supreme Court reviewed this issue and correctly found that the trial court did all it could to be fair to the petitioner in dealing with this difficult situation. See Coe v. State, 2000 WL 246425, at *27-28. The record simply does not reveal that the trial judge's gagging of Coe evidenced his judgment, arrived at prior to hearing all of the evidence, that Coe was acting with volition. Judge Colton's post-hearing findings concerning Coe's behavior were mandated

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[34]The videotapes reveal that, during the two days of trial prior to the onset of this outrageously disruptive conduct, petitioner and his lawyers talked back and forth on many occasions. However, once this disruptive conduct started, not one of his several counsel attempted to talk with him, calm him down or convince him to change his behavior.

by Van Tran, see 6 S.W.3d at 271, had expert witness support in the record (Tr. 780-81), and were justified by his own observations of Coe during the hearing.[35]

The allegations about the trial judge receiving personal threats from others before or during the hearing and making statements after the Tennessee Supreme Court upheld his ruling are not matters which are in this record, and the court will not entertain them. The court does observe, however, that to presume that a judge will decide a case in the way favored by the person making the threat is a large presumption that is rebutted by the federal court history of this very case.

One additional point should be made that goes to Judge Colton's impartiality. The State sought to have admitted into evidence a tape recording of Coe's confession to the murder and rape of which he was convicted. Judge Colton heard both sides and announced he wanted to consider this overnight before making a ruling. (Tr. 1022-27) Despite the strong arguments made by the State as to the tape's relevancy, Judge Colton ruled before the day was out that he would not receive the tape in evidence. (Tr. 1054)

71. *Dr. Martell's testimony was unreliable.*

The Tennessee Supreme Court dealt at length with the petitioner's contentions about Dr. Martell's testimony. See Coe v. State, 2000 WL 246425, at *30-31. Specifically, Petitioner contends that the use of the tests Dr. Martell relied upon in determining that Petitioner was malingering violated due process because the tests have never been validated for death row inmates.

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[35]The videotapes show that Coe stopped his stream of obscene rantings when something was happening in court that he wanted to listen to. See Trial Ex. 12.

However, as noted by the state courts, these tests were also administered by Petitioner's court-appointed expert, Dr James Walker. See Trial Ct. Op. at 23; Coe v. State, 2000 WL 246425, at *31.

72. *The trial court improperly relied upon hearsay statements made by the State's trial counsel in reaching its decision on petitioner's competency*

The Tennessee Supreme Court correctly ruled that these statements did not constitute prosecutorial misconduct and did not render the hearing "fundamentally unfair." See Coe v. State, 2000 WL 246425, at *20-21.

73. *The entire Tennessee State Attorney General's office should have been disqualified from this case, rather than only the Attorney General himself.*

The Tennessee Supreme Court correctly ruled on this issue, see Coe v. State, 2000 WL 246425, at *20. and this court has separately ruled on petitioner's motion made in this proceeding, see Docket No. __.

CONCLUSION

For the foregoing reasons, this court denies Coe's present petition for writ of habeas corpus.

An appropriate Order will enter.

ALETA A. TRAUGER
United States District Judge